

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

In the Matter of:

**LIFEFLITE MEDICAL AIR
TRANSPORT, d/b/a American
Native Medical Air**

FAA Order No. 2000-28

Served: December 21, 2000

Docket No. CP98WP0062

ORDER¹

Complainant is appealing from Administrative Law Judge Burton S. Kolko's Order Terminating Proceeding dated October 26, 1999.² Lifeflite Medical Air Transport ("Lifeflite") submitted a motion representing that it had closed as a business, had returned its operating certificate to the FAA, and had no staff, money or assets. The law judge cancelled the hearing and dismissed the complaint³ with prejudice, finding that "further proceedings, even if successful, would amount to the beating of a dead horse." Order Terminating Proceeding at 1.

¹ The Administrator's civil penalty decisions are available on LEXIS, Westlaw, and other computer databases. They also can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, *see* 65 Fed. Reg. 67,445, 67,462 (November 9, 2000).

² A copy of the law judge's order is attached.

³ Complainant alleged that two Lifeflite employees performed safety-sensitive functions although Lifeflite had not received a verified negative pre-employment drug test result for these employees, and as a result, Lifeflite violated 14 C.F.R. § 135.21(a) and 14 C.F.R. Part 121, App. I, Section V.A. Complainant sought a \$7,000 civil penalty.

Complainant's appeal is granted, the law judge's order is reversed,⁴ and this matter is remanded to the Department of Transportation (DOT) Office of Hearings for further proceedings.

Lifeflite had the burden of proving the matters presented in its motion to dismiss. 14 C.F.R. § 13.224(b).⁵ Lifeflite provided no documentary evidence to substantiate its allegation that it had no staff, money or assets. Hence, the law judge was in error when he accepted that unsubstantiated representation as a basis for the order to dismiss.⁶ The law judge should have held the hearing, and if after the presentation of evidence, he determined that Lifeflite had violated the Federal Aviation Regulations (FAR), as alleged, then he could have taken evidence on whether Lifeflite had the financial means to pay an appropriate civil penalty.

⁴ In his order, the law judge wrote that Complainant had filed a reply one day late to Lifeflite's motion to dismiss, and as a result, he had not considered the arguments presented in that reply. The law judge was mistaken. The law judge made this error because he computed the due date starting from the date typed on the top of the one-page motion—October 6, 1999 -- rather than the postmark date – October 7, 1999. [In the addendum to its appeal brief, Complainant included a copy of the envelope in which Lifeflite served its motion upon Complainant.] When, as in this case, there is no certificate of service, the postmark date constitutes the date of service. Under 14 C.F.R. §§ 13.218(d) and 13.211(e), Complainant's reply was due on October 22nd, 15 days after the October 7th postmark date. Thus, since Complainant's reply was filed on October 22, 1999, it was filed in a timely fashion, and the law judge should have considered it. However, in light of the outcome of the Administrator's decision, there is no need to remand the matter to the law judge for consideration of the reply to the motion to dismiss.

⁵ Section 13.224(b) of the Rules of Practice provides: "Except as otherwise provided by statute or rule, the proponent of a motion, request, or order has the burden of proof." 14 C.F.R. § 13.224(b).

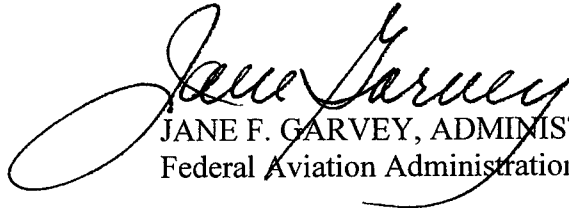
⁶ Similarly, the Administrator has held that a respondent claiming inability to pay a civil penalty has the burden to prove this affirmative defense by the preponderance of the evidence. *I.e., In the Matter of Mauna Kea Helicopters*, FAA Order No. 97-16 at 20 (May 23, 1997); *In the Matter of Costello*, FAA Order No. 93-10 at 3-4 (June 22, 1994). Unsworn and unsubstantiated statements by a respondent are insufficient to prove inability to pay. *In the Matter of Giuffrida*, FAA Order No. 92-72 at 4 (December 21, 1992).

Moreover, Lifeflite's surrender of its air carrier operating certificate would not obviate the need for a punitive and deterrent civil penalty if the law judge held, after a hearing, that Lifeflite had violated the FAR. See In the Matter of California Helitech, FAA Order No. 2000-18 at 11-12 (August 11, 2000). Lifeflite may apply again for another operating certificate in the future even though it has surrendered its operating certificate. *Id.*, at 12. In that case, whether it had a violation-free history may be pertinent to the issue of re-certification.⁷ Also, if the law judge found that Lifeflite had violated the FAR, then a civil penalty against Lifeflite for these violations hopefully would serve to deter other operators from committing similar violations. Hence, Complainant should not have been denied the opportunity to prove at a hearing that Lifeflite had violated the FAR, as alleged.

Lifeflite also argued in its motion to dismiss that a conflict of interest existed because Steve Hanes, who was Lifeflite's Drug Program Manager at the time of the alleged violations, currently is a Principal Operations Inspector for the FAA Flight Standards District Office in Scottsdale, Arizona. The law judge held that this issue was moot in light of his determination to cancel the hearing and to dismiss the complaint with prejudice. If Lifeflite renews this conflict of interest argument, the law judge may issue whatever instructions he deems necessary to prevent Lifeflite from undue prejudice.

⁷ If re-certified, then a civil penalty in this case, if warranted, would serve as a deterrent against a similar violation in the future.

THEREFORE, Complainant's appeal is granted, the order terminating proceeding is reversed, and this matter is remanded to the DOT Office of Hearings for further proceedings.


JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 19th day of December, 2000.